

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

Erik B. Cherdak
149 Thurgood Street
Gaithersburg, Maryland 20878

Plaintiff,

v.

ASCENA RETAIL GROUP, INC.
a.k.a. The Dress Barn Inc.
/dba/ JUSTICE (a.k.a. Tween Brands, Inc.)
30 Dunnigan Drive
Suffern, New York 10901

Defendant.

Case No. 1:11cv353 L06/JFA

**COMPLAINT FOR
PATENT INFRINGEMENT**

JURY TRIAL DEMANDED

**RELATED CASE:
1:10-cv-1029 (LO/JFA)**

Plaintiff Erik B. Cherdak ("Plaintiff" or "Cherdak"), by and through undersigned counsel, submits this Complaint against Defendant ASCENA RETAIL GROUP, INC. ("ASCENA"), and states as follows:

THE PARTIES

1. Plaintiff is an individual who resides in Gaithersburg, Maryland at the address listed in the caption of this Complaint.
2. On information and belief Defendant ASCENA RETAIL GROUP, INC. ("ASCENA") is a Connecticut corporation having a principal place of business as specified in the caption of this Complaint.
3. On information and belief Defendant ASCENA is a newly formed entity which previously was a publicly traded company bearing the name The

Dress Barn, Inc. which entity previously owned and operated the JUSTICE brand and retails facilities, respectively. At the time of filing it was believed that Defendant ASCENA owns and operates a wholly owned subsidiary including, but not limited to, the JUSTICE™ stores and website at shopjustice.com. For purposes of this Complaint, the named defendant and the real-party-in-interest shall be referred to as “ASCENA” given The Dress Barn, Inc.’s most recent U.S. Security and Exchange Commission Form 10K/A filing.

JURISDICTION AND VENUE

4. This is an action for Patent Infringement under the Laws of the United States of America and, in particular, under Title 35 United States Code (Patents – 35 USC § 1, *et seq.* (The “U.S. Patent Act”)). Accordingly, Jurisdiction and Venue are properly based under Sections 1338(a), 1391(b) and (c), and/or 1400(b) of Title 28 of the United States Code.
5. Defendant sells infringing lighted shoes through its own retail stores including those retail stores located in this judicial district and is therefore subject to this court’s jurisdiction. On information and belief, Defendant ASCENA owns and operates many JUSTICE retail stores like and/or similar to a JUSTICE STORE No. 877 located at FAIR OAKS MALL, 11903 Fair Oaks Mall, in Fairfax, Virginia, USA. Additionally, Defendant ASCENA operates its wholly-owned retail website at www.shopjustice.com which Defendant has made accessible to citizens of this Judicial District 24 hours per day, 7 days per week and 365 days per year.

FACTS

6. On July 6, 1993, Plaintiff filed a patent application entitled “Athletic Shoe with Timing Device” that resulted in the issuance of U.S Patent No. 5,343,445 on August 30, 1994 (the “Cherdak Patent” or the “445 Patent”). The Cherdak patent is directed, *inter alia*, to lighted shoes like those sold by the Defendant. The Cherdak patent has successfully gone through additional expert review before the USPTO during reexamination proceedings related to the same. See USPTO Reexamination Proceeding Control No. 90/008,269. Those reexamination proceedings resulted, *inter alia*, in the confirmation of many claims without amendment; many of said claims form the basis of the instant lawsuit. Copies of the Cherdak Patent and its corresponding reexamination certificate is attached at EXHIBITS 1 and 2.
7. The Defendant has in the past used, imported, distributed, sold and offered for sale, and continues to use, import, distribute, sell and offer for sale, infringing shoes such as those bearing the JUSTICE brand trademark. **EXEMPLARY** infringing shoes sold by Defendant as late as April 5, 2011, include, *but are not limited to*, JUSTICE branded light up low-top sneakers.
8. *The infringing shoes mentioned in this COMPLAINT are merely Exemplary infringing shoes and, on information and belief,*

Defendant does sell, does offer for sale, and does distribute other shoes now on store shelves (and which have been sold in the past) at least in this judicial district and/or throughout the United States. Accordingly, the particular shoe model(s) identified in paragraph number 6, supra, are merely exemplary and do not constitute a full and complete identification of all infringing shoes which are contemplated by this Complaint for Patent Infringement and the instant lawsuit commenced hereby – Due discovery in this case will reveal all infringing shoes used, made, imported, offered for sale, and/or sold by the Defendant individually and/or collectively with other parties.

9. **DEFENDANT ASCENA IS HEREBY ADVISED THAT THE PLAINTIFF, THE INSTANT LAWSUIT AND THIS COMPLAINT DO NOT SEEK REMEDIES IN CONNECTION WITH ANY ACTS OF PATENT INFRINGEMENT BY DEFENDANT RELATED TO LIGHTED SHOE PRODUCTS WHICH ARE MANUFACTURED BY AND/OR WHICH ARE SOURCED TO (SUPPLIED TO) DEFEDANT FROM ANY OF THE FOLLOWING PARTIES:**

COLLECTIVE BRANDS, INC. (/dba/ PAYLESS, INC.)
BBC INTERNATIONAL, INC.
STRIDE-RITE CORPORATION
ESO ORIGINALS, INC.
VIDA SHOES INTERNATIONAL, INC.
CHAMELEON, INC.
SKECHERS USA INC.
TARGET STORES, INC. (A.K.A. TARGET BRANDS, INC.)
THE WALT DISNEY COMPANY
ELAN-POLO, INC.
PUMA NORTH AMERICA, INC.
DINOSOLES (A.K.A. SCULPTED FOOTWEAR)
GEOX S.p.A.

COUNT I – PATENT INFRINGEMENT

Paragraphs 1 through 9 are hereby incorporated by reference as though completely set forth herein.

10. Given the validity and corresponding enforceability of the Cherdak Patent against past, present, and future infringing acts and other activities prohibited under the U.S. Patent Act (35 USC § 1, *et seq.*), Plaintiff Cherdak, *inter alia*, possesses the right to pursue claims in connection with the Defendant's past, present, and future design, use, manufacture, importation, sale, offer for sale, and distribution of infringing shoes under 35 USC § 271(a), (b), and (c).
11. On information and belief Defendant has infringed, contributed to the infringement of, and/or induced the infringement of the Cherdak Patent in violation of 35 USC § 271(a), (b), and (c) by its design, use, manufacture, importation, distribution, sale, and offer for sale of shoes including, **but not limited to**, the shoes identified in paragraph 7 *supra*.
12. On information and belief, Defendant has infringed the Cherdak Patent in violation of 35 USC § 271(b) by actively inducing distributors, customers, and/or other retailers to infringe the Cherdak Patent.
13. Such infringing acts on the part of Defendant have and continue to injure and damage Plaintiff. Accordingly, without the grant of adequate

remedies at law and in equity, Defendant will be permitted to willfully infringe the Cherdak Patent to Plaintiff's further detriment.

PRAYER FOR RELIEF

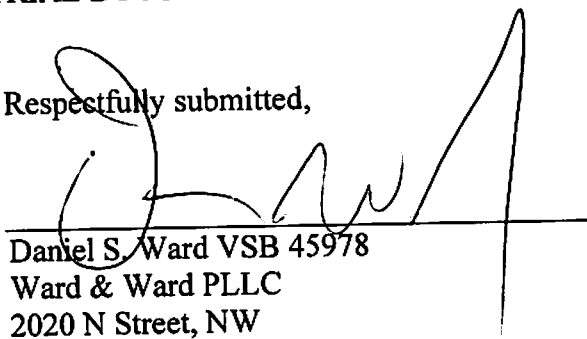
WHEREFORE, Plaintiff Cherdak prays for judgment and relief against the Defendant as follows:

- A. That permanent injunctions be issued against continued infringement of the '445 Patent by Defendant and its parents, subsidiaries, officers, directors, employees, affiliates, representatives and agents, and all those acting in concert with or through Defendant, directly or indirectly, including, but not limited to, distributors, customers, and other retailers;
- B. That an accounting be had for damages caused to Plaintiff Cherdak by Defendant's acts in violation of the U.S. Patent Act (35 USC § 1, *et seq.*) together with pre-judgment and post-judgment interest;
- C. That damages be awarded in accordance with the U.S. Patent Act, 35 USC § 1, *et seq.*;
- D. That any damages awarded in accordance with any prayer for relief be enhanced and, in particular, trebled in accordance with the U.S. Patent Act (35 USC § 1, *et seq.*) for any of Defendant's acts which are found to be willful acts of patent infringement; and
- E. Such other and further relief as this Court shall deem just and proper.

DEMAND FOR TRIAL BY JURY

The Plaintiff hereby demands a TRIAL BY JURY on all issues so triable.

Respectfully submitted,



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